Advanced Stretchforming International, Inc. *and* International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW), Amalgated Local Union No. 509, AFL–CIO. Case 21–CA–29104

December 7, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On April 25, 1997, the National Labor Relations Board issued a Decision and Order[1] in this proceeding finding that Respondent Advanced Stretchforming International, Inc., as successor employer, violated Section 8(a)(1) and (5) of the National Labor Relations Act by, among other things, unilaterally changing terms and conditions of employment set forth in the collective-bargaining contract between the Union and a predecessor employer.[2] To remedy these violations, the Board ordered that the Respondent restore the status quo by "rescind(ing) any changes in employees' terms and conditions of employment unilaterally effectuated and to make the employees whole by remitting all wages and benefits that would have been paid absent [its] unlawful conduct, until [it] negotiates in good faith with the union to agreement or to impasse." 323 NLRB at 531.

Thereafter, the Board petitioned for enforcement of its Order with the United States Court of Appeals for the Ninth Circuit. On November 22, 2000, the court issued its decision enforcing the Board's Order, except for the backpay award.[3] The court noted that the "Board applied the presumption that an award of backpay and benefits under the repudiated bargaining agreement restores the status quo ante, but did not consider whether [the Respondent] had rebutted that presumption with evidence that it would have bargained to an impasse and imposed less favorable terms." 233 F.3d at 1182. Concluding that the record was not fully developed under this "correct legal standard," the court remanded the case to permit the Respondent and the Union to "present evidence on whether [the Respondent] and the Union would have bargained to impasse and imposed terms, even had the [Respondent] honored its obligation to bargain with the Union." Id. at 1183.

On May 4, 2001, the Board advised the parties that it had accepted the court's remand and that statements of position could be filed with respect to the issues raised by the remand. The General Counsel, the Respondent, and the Union filed position statements.

For the reasons stated in prior cases addressing similar judicial opinions on the backpay issue raised here,[4] we respectfully continue to adhere to the view that in circumstances similar to those presented here,

> [I]t is appropriate to calculate backpay on the basis of the contractual rates paid by the predecessor (in other words, the existing terms and conditions of employment) because the successor's unlawful failure to recognize and bargain with the Union has left us without an adequate or reasonable alternative basis for calculating what rates would have been arrived at through bargaining.[5]

We accept, however, on remand, the court's decision as the law of the case. Accordingly, this case will be remanded for reopening of the record and further hearing before an administrative law judge for the limited purpose of taking evidence on the extent of the Respondent's backpay liability, i.e., "whether [the Respondent] would have bargained to impasse and imposed terms, even had [the Respondent] honored its obligation to bargain with the Union." 233 F.3d at 1183.[6] As in *Armco*,

> a remand hearing is necessary to determine whether [the Respondent] would have agreed to the monetary provisions of the predecessor employer's collective-

[1] 323 NLRB 529.

[2] The Board found that the Respondent, having unlawfully stated to employees in the predecessor's workforce that there would be no union at the new company, had forfeited the customary right of a successor employer to set initial terms of employment without first bargaining with the Union. 323 NLRB at 530–531.

[3] *NLRB v. Advanced Stretchforming International, Inc.*, 233 F.3d 1176, cert. denied ___ S. Ct ____ (October 9, 2001). The court's decision vacated original opinions filed on April 4, 2000, and reported at 208 F.3d 801. The Respondent has requested a stay of further Board proceedings in this case pending the Supreme Court's decision whether to grant a writ of certiorari. In light of the Supreme Court's denial of certiorari, the request is now moot.

[4] See *State Distributing Co.*, 282 NLRB 1048 (1987), responding to the Ninth Circuit's denial of enforcement in relevant part in *Kallman v. NLRB*, 640 F.2d 1094(1981), and *Armco, Inc.*, 291 NLRB 1171 (1988), on remand from the Sixth Circuit pursuant to its decision in *Armco, Inc. v. NLRB*, 832 F.2d 357 (1987).

[5] *State Distributing Co.*, 282 NLRB at 1049.

[6] Chairman Hurtgen concludes that a successor employer is ordinarily free to set its own terms and conditions of employment. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). Further, in his view, the Respondent's Sec. 8(a)(1) statement did not forfeit that right. See Chairman Hurtgen's dissenting opinion in *Pacific Custom Materials*, 327 NLRB 75, 75 (1998). Accordingly, he would not have required Respondent to continue the predecessor's terms and conditions of employment. However, he acquiesces in the law of the case herein, and agrees with the Board's remand order.

> bargaining agreement with [the Union]; whether a good-faith impasse in negotiations would have been reached as of a certain date; and whether [the Respondent] would have lawfully implemented its own monetary terms as of that date. Because it is uncertain whether [the Respondent] would have agreed to the monetary terms of the prior contract between [the Union] and the predecessor employer, the burden of proof must be placed on [the Respondent] to establish that it would not have agreed to the terms of the prior contract, the date on which it would have bargained to agreement, and the terms of the agreement that would have been negotiated, or to establish the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals. The Board has consistently held that such uncertainties should be resolved against the party whose unlawful acts created them.[7]

ORDER

It is ordered that this proceeding is remanded to the administrative law judge for reopening the record for further hearing for the purpose of making specific factual and legal findings concerning the extent of the Respondent's backpay liability. The administrative law judge shall prepare a supplemental decision containing credibility resolutions, findings, conclusions, and recommendations as deemed necessary, consistent with this remand Order. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

Dated, Washington, D.C. December 7, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[7] 291 NLRB at 1173 (citation omitted).